Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1147

APPALACHIAN POWER COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA

REPLY OF PETITIONERS TO BRIEF IN OPPOSITION

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The Solicitor General's principal defense of the result reached by the court below is an argument that nowhere appears in that court's decision and was never argued or explored at any previous stage of this litigation. The Government contends that petitioner Appalachian's license was not vested because the Commission's order was stayed at the time Pub. L. No. 94-407 was enacted. This is a wholly different theory from the theory of the Court of Claims, which held that no license, whether or not subject to a stay, can be a vested right until judicial review has been completed.

The Government's theory rests, as we shall see, on one incorrect assumption of fact, one unsound assump-

tion as to the law, and one highly dubious and scantily supported legal proposition. These matters can be considered on their merits if this Court grants certiorari; indeed, the Government's invocation of them makes this case more, rather than less, deserving of this Court's review. If the judgment below were not reviewed it would remain a precedent, not for the Government's new theory, but for what the Court of Claims actually held. For all the reasons advanced in the petition for certiorari, that result should not be permitted. It is additionally significant that the Government is unwilling to support the decision below as written and now finds it necessary to rely on an argument not only not adopted by the court below but expressly repudiated by the Government in the proceedings there.[1]

I.

The Solicitor General's incorrect assumption of fact is that the mandate of the court of appeals in *North Carolina* v. *FPC,* 533 F.2d 702 (D.C. Cir. 1976), was subject to a stay at the time Pub. L. No. 94-407 was enacted. This, the Government asserts, follows from the fact that the court of appeals on May 5, 1976, granted a stay of its mandate to and including May 14, 1976, and that "under the provisions of Fed. R. App. P. 41, the . . . mandate remained stayed pending disposition of the certiorari petition." Brief in Opposition, p. 4. Rule 41, however, provides that such a stay shall continue only "if during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court . . . ." The docket sheet of the court of appeals shows that such a notice was *not* filed during the period of the stay but was filed only on May 17, 1976. *See* Appendix hereto. Since no notice was filed by May 14, 1976, the provision of Rule 41 continuing the stay of mandate until final disposition of the certiorari petition by this Court never came into effect, and the stay of mandate expired according to its terms on May 14, 1976.[2] No stay was in effect when Pub. L. No. 94-407 was enacted. Thus the factual premise of the Government's argument falls.[3]

[1] "This stay [the stay granted by the Court of Appeals in North Carolina v. FPC, on January 31, 1975, on which the Government so heavily relies] was ultimately vacated . . . ." Defendant's cross-motion for judgment on the pleadings and defendant's response to plaintiffs' motion for partial judgment on the pleadings, Ct. Cl. Doc. No. 62-78, December 29, 1978, p.2.

II.

The Government's unsound assumption of law—not stated explicitly, and not supported by any authority—is that a stay on appeal impairs the effective or vested

[2] The fact that the court of appeals never issued the mandate is of no significance for the expiration of the stay. Rule 41 makes the issuance of the mandate mandatory once certain conditions are met. The court's failure to perform a ministerial act cannot change rights dependent upon the mandate, even assuming that petitioner's rights were so dependent. See Parts II and III, which demonstrate that they were not.

[3] The Government's mistake on this point is perhaps understandable since neither the stay of mandate relied on by the Government nor the docket entry mentioned above even appears in the record of this case. The risk of such mistakes is substantial when, as here, the Government chooses to raise a wholly new theory, for which even the factual basis was not laid below, when a case reaches this Court.

quality of a right, rather than merely postponing its exercise. The correct view is that a stay is simply a postponement of the ability to exercise a right. Here, the stay (which, as shown above, had in any event expired by the time petitioner's license was nullified) was for the sole purpose of postponement in case the license should be divested by the occurrence of a condition subsequent that was a qualification of the license itself: namely, reversal on judicial review, an occurrence that never happened. The purpose of the stay was not to give Congress yet another chance to nullify the license without compensation. Even if a stay had existed at the time Congress acted, it should not be held to have had such an effect.[4]

The FPC's order, effective January 2, 1975, was of course a "final order," which is one that "impose[s] an obligation, den[ies] a right or fix[es] some legal relationship as a consummation of the administrative process." *Chicago & Southern Air Lines* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948); *Ecee, Inc.* v. *FPC*, 526 F.2d 1270, 1273 (5th Cir.), *cert. denied*, 429 U.S. 867 (1976); *see Port of Boston Maine Terminal Association* v. *Rederiaktiebologet Transatlantic*, 400 U.S. 62, 71 (1970).

[4] The Government, by taking one phrase from the Commission's opinion granting the license out of context, has also attempted to argue that the Commission itself conditioned effectiveness of the license on the absence of judicial-review proceedings. Brief in Opposition, p. 8. However, the Commission's own opinion of December 31, 1974, expressly refused to order a stay denying the effectiveness of the license because of judicial review. 52 F.P.C. 1986 (1974). North Carolina's simple request for a stay or its filing a notice of appeal from the Commission's decision could not, in itself, prevent the license from becoming effective, since the Federal Power Act explicitly states that "[t]he commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." 16 U.S.C. § 825*l*(c). *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 155-56 (1967).

The sole purpose and effect of a stay of an agency order is to maintain the status quo while the reviewing court considers the merits of the case. *See Cumberland Tel. & Tel. Co.* v. *Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922); *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The entry of a stay is not an adjudication of the merits of the controversy and cannot affect the vested nature of rights involved therein. *Cf. Frith* v. *Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 900 (5th Cir. 1975). Thus, although the court of appeals' stay precluded petitioner temporarily from exercising its rights under its license and thereby disturbing the status quo, the rights themselves were unaffected pending the appeal.

III.

The Government's dubious legal proposition is that a court of appeals judgment affirming an agency decision has no effect whatever until the court's mandate is received by the agency. In *North Carolina* v. *FPC*, *supra*, the court of appeals' opinion and judgment of March 24, 1976, affirming the FPC's decision, provided that "the stay order by this court dated January 31, 1975 is vacated." 533 F.2d at 710. The Government's theory is that (a) in spite of this language the stay continued so long as the mandate remained unreceived by the FPC, and (b) the FPC was without jurisdiction when on March 26, 1976, it declared that the license "is in effect." *Appalachian Power Co., Project No. 2317*, FPC Order Modifying License (March 26, 1976).

None of the authorities cited by the Government (p. 4, n.2) distinguish between the general return of jurisdiction to the agency and the status of a stay pending appeal. This distinction, which is recognized among other places in Fed. R. Civ. P. 62, is of critical importance to the Government's argument. Courts of appeals have acknowledged that lower courts or agencies retain some power over a case even while it is pending in the court of appeals. *E.g., Puerto Rico* v. *SS Zoe Colocotroni,* 601 F.2d 39 (1st Cir. 1979); *United States* v. *El-O-Pathic Pharmacy,* 192 F.2d 62, 78-80 (9th Cir. 1951). Even if jurisdiction for some purposes does not return to the agency until the mandate is received, the court of appeals has the power to vacate a stay, and the agency has the power to recognize that act, whenever the court so orders.

The relevant part of the FPC's order of March 26, 1976, did not purport to exercise jurisdiction; it was merely declaratory or explanatory. The relevant portion reads:

> "As to the effective date of the license, we observe that Ordering Paragraph (D) of the license now provides:
>
> > (D) The license granted herein shall become effective January 2, 1975, unless on that date there exists an Act of Congress that would delay or foreclose the Blue Ridge Project.
>
> As the Court of Appeals observed, 'The proposed legislation was not enacted by Congress'. Slip Op., p. 4. This Commission has heretofore granted no stay in the effective date of the license. The stay granted on January 31, 1975, by the Court of Appeals was vacated effective March 24, 1976. Accordingly, the license for the Blue Ridge Project, subject to Article 33 as herein modified, is in effect."

It is true that the court of appeals apparently thought some further action by the Commission was necessary "to make the license effective." 533 F.2d at 709. However, as the Commission correctly pointed out in the passage quoted above, the exercise of the license *automatically* became free of any constraint as soon as the stay issued in connection with the review petition had been vacated. A merely declaratory order would not have been in excess of the Commission's jurisdiction even while the appeal was pending, since 16 U.S.C. § 825*l*(b) makes the court of appeals' jurisdiction exclusive only "to affirm, modify, or set aside such order in whole or in part," which does not appear to prohibit declaratory orders. The Government's position that the Commission could not so act even after the appeal was over and the stay was lifted is wholly without merit.

IV.

The Government has also made several other points that can be answered briefly. First, it suggests that petitioner has somehow conceded that its license was not effective because "it took no action in reliance" on the license until after the court of appeals had rendered its decision. Brief in Opposition, p. 9. Petitioner's prudence during the periods when the license was not subject to a stay, however, is hardly a concession that the Government's theory is correct. The Government admits that petitioner did commence preliminary archaeological studies under the license after the court of appeals had affirmed it. In any event, the risk that caused petitioner to move slowly while judicial review was pending—namely, that a court would overturn the license—never materialized.

Second, in arguing that Pub. L. No. 94-407 was a "law of general application," pp. 11-12 and n.3, the Government is again trying to avoid defending the Court of Claims' actual decision. The court below did discuss that theory at some length, but it made it clear that the decision was based solely on the pendency of judicial review. For reasons suggested briefly in our Petition (p. 6 n.4; p. 8 n.6; p. 21 n.20), the argument is wholly without merit. As with the Government's principal argument, its invocation here makes the case more, rather than less, deserving of review by this Court.

Finally, the Government has unsuccessfully attempted to distinguish the two decisions of this Court with which the Court of Claims opinion conflicts, *Payne* v. *New Mexico,* 255 U.S. 367 (1921), and *CAB* v. *Delta Air Lines,* 367 U.S. 316 (1961). The Government concedes that the Secretary of the Interior in *Payne* was empowered to decide whether the land selections "met all applicable requirements [of the law] when made." This is precisely the extent of the court of appeals' power under 16 U.S.C. § 825*l*. The Government fails completely to recognize that the underlying rationale of *Delta Air Lines* was deference to the congressional purpose to ensure security of route, just as Congress intended in the Federal Power Act to ensure security of investment in hydroelectric projects. An interpretation of the Federal Power Act that fails to implement this congressional purpose would conflict with *Delta Air Lines.*

CONCLUSION

For all the reasons stated above and in the petition for certiorari, this Court should grant the petition.

Respectfully submitted,

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April 25, 1980

APPENDIX

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Excerpt from Docket Entries,
North Carolina v. FPC, Doc. No. 74-1941
United States Court of Appeals for the D.C. Circuit

DATE	FILINGS-PROCEEDINGS
(G) 5-17-76	Certified copy of notice from Supreme Court that writ of certiorari [sic] was filed on May 14, 1976 in S.C. No. 75-1657